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LOS ANGELES, THE COCA-COLA COMPANY,
AND COCA-COLA REFRESHMENTS USA,
INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GARY KILBOURNE, on behalf of
himself and all others similarly
situated, and on behalf of the general
public,

Plaintiff,

v.

THE COCA-COLA COMPANY;
COCA-COLA REFRESHMENTS
USA, INC.; COCA-COLA
ENTERPRISES, INC., and DOES 1-
100,

Defendants.

Case No. 3:14-cv-00984-MMA-(BGS)

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF ITS OPPOSITION TO
PLAINTIFF'S MOTION FOR
RECONSIDERATION OF COURT
ORDER DENYING CLASS
CERTIFICATION**

Date: September 28, 2015

Time: 2:30 p.m.

Ctrm: 3A

Judge: Hon. Michael M. Anello

Complaint filed: March 20, 2014

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Defendants BCI Coca-Cola Bottling Company of Los Angeles (“BCI”), Coca-Cola Refreshments USA, Inc. and The Coca-Cola Company (collectively, “Defendants”) submit the following opposition to Plaintiff’s Motion for Reconsideration of the Order Denying Class Certification:

I. FEDERAL RULE OF CIVIL PROCEDURE 59 DOES NOT PERMIT RECONSIDERATION EXCEPT AFTER ENTRY OF JUDGMENT

Federal Rule of Civil Procedure 59 sets forth the standard for requesting reconsideration following entry of judgment. Plaintiff expressly identifies Rule 59 as the basis for his motion, yet no judgment has been entered and application of Rule 59 is therefore not permitted. An order denying class certification is an interlocutory order, not a final judgment. *See* Fed. R. Civ. P. 23(f). When a motion for reconsideration is sought from an interlocutory order, the request is not a Rule 59 request and is instead a request for the district court to revisit its earlier ruling. *See e.g., Balla v. Idaho State Bd. Of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989)(affirming district court order denying motion for reconsideration because it was improperly brought under Rule 59(e) and declining to reach the merits of the appeal); *Abarca v. Merck & Co., Inc.*, No. 1:07-cv-388 DOC (DLBx), 2012 WL 137749 (C.D. Cal. Jan. 17, 2012).

While relief from an order may be sought pursuant to Rule 60, Plaintiff does not identify Rule 60 as the authority for his motion and does not identify any basis for seeking relief that could fall under that rule.¹ Plaintiff’s motion for reconsideration should be denied because Rule 59(e) is not available to him as a means of seeking reconsideration of the interlocutory order denying class certification.

¹ Rule 60(b) identifies the following potential bases for relief from an order: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . or (6) any other reason that justifies relief. Rule 60(a) also permits the correction of clerical mistakes.

II. PLAINTIFF'S DISAGREEMENT WITH THE COURT'S RULING IS NOT A LEGITIMATE BASIS FOR SEEKING RECONSIDERATION

Even if Plaintiff's motion had been properly brought under Rule 59(e), it should be denied because a Rule 59(e) motion "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed *clear error*, or if there is an intervening change in the controlling law." *McDowell v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (emphasis in original) (internal quotations omitted); *School Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "Reconsideration should be used conservatively, because it is an 'extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources.'" *Soto v. American Honda Motor Co., Inc.*, No. C 12-01377 SI, 2012 WL 5877476, *3-4 (N.D. Cal. Nov. 20, 2012), quoting *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) *see also Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1063 (9th Cir. 2005); *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). When ruling on a motion for reconsideration, the district court exercises its discretion. *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 883 (9th Cir. 2000).

Here, Plaintiff asks for reconsideration because he disagrees with the Court's conclusion that Plaintiff failed to satisfy both Rule 23(a)(2)'s commonality requirement and Rule 23(b)(3)'s requirement that questions of law or fact predominate over questions affecting only individual members. As the Court explained:

Plaintiff puts the proverbial cart before the horse. Plaintiff sets forth the method of proving Coca-Cola's liability without first establishing the basis for classwide liability—that Coca-Cola implemented a company-wide policy or practice in contravention to California's Labor Code. Plaintiff fails to demonstrate the existence of Coca-Cola's purported directed requiring supervisors to review either the Document Registers

1 or Telogis reports during driver debriefs.

2 See Order at 16:20-25. Based on its review of the evidence, the Court found that there
 3 was “an absence of proof of a company-wide directive or common policy,
 4 determining if and how supervisors at various Distribution Centers use the driver
 5 records, if at all,” necessitating an individualized inquiry into the Distribution Centers’
 6 practices. See Order at 19:19-20. Notably, Plaintiff does not disagree with the
 7 Court’s conclusion that there is no common policy and that individualized inquiries
 8 would be needed based on its review of the evidence. Instead, he contends that the
 9 Court committed clear error by requiring him to present proof of a common policy or
 10 practice.

11 Disagreement with the court’s ruling is insufficient for Rule 59(e) relief.
 12 *U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir.
 13 2002). “A motion for reconsideration may not be used to get a second bite at the
 14 apple. It is not a method by which . . . to reargue an issue.” *Campion v. Old Republic*
 15 *Home Prot. Co.*, No. 09-cv-748-JMA (NLS), 2011 WL 1935967, *1 (S.D. Cal. May
 16 20, 2011) (internal citations omitted). Here, Plaintiff made the same argument that he
 17 makes now in his motion for class certification and at the hearing on the motion for
 18 class certification.² His argument was repeated many times and was clearly not lost
 19 on the Court, since the Court’s order summarized the argument before rejecting it as
 20 “misplaced”:

21 During oral argument, Plaintiff’s counsel argued that in this
 22 Circuit, Plaintiff need not show a company-wide directive, or
 23

24 ² The Southern District of California’s Local Rule governing motions for
 25 reconsideration requires that the moving party submit, among other things, “what new
 26 or different facts and circumstances are claimed to exist which did not exist, or were
 27 not shown, upon such prior application.” See S.D. Cal. Local Rule 7.1.h(i).
 28 Plaintiff’s motion is supported only by the declaration of counsel attaching a copy of
 the transcript from the hearing on the motion for class certification, which only
 underscores that he seeks here to rehash old arguments. He does not identify any new
 or different facts or circumstances.

any common policy or practice for that matter, to satisfy the commonality under Rule 23(a)(2). Instead, Plaintiff insists that under the Ninth Circuit’s decision in *Jimenez*, the existence of Coca-Cola’s records alone, in particular the Kronos timekeeping records and Document Registers, is sufficient to establish commonality. Plaintiff asserts that *Jimenez* stands for the proposition that “[c]ommonality for off-the clock work is satisfied when the existence of computer systems or records show work being performed whereas the time records indicate otherwise. [¶] However, the Court finds Plaintiff’s reliance misplaced. . . .”

See Order, 19:21-12.

Having already made his argument to the Court and the Court having rejected it, Plaintiff cannot now ask the Court to hear his argument again. “A motion for reconsideration cannot be used to ask the Court to rethink what the Court has already thought merely because the party disagrees with the Court’s decision.” *Jeld-Wen Master Welfare Benefit Plan v. Tri-City Health Care District*, No. 12cv197-GPC (RBB), 2013 WL 1882263, *11 (S.D. Cal. May 6, 2013), quoting *Collins v. D.R. Horton, Inc.*, 252 F.Supp.2d 936, 938 (D. Az. 2003); *Lucas v. Hertz Corp.*, No. C 11-01581 LB, 2012 U.S. Dist. Lexis 119937, *16 (N.D. Cal. Aug. 22, 2012) (denying motion for reconsideration in part because plaintiff “remakes arguments that the court previously rejected after giving them substantial consideration”). Because Plaintiff seeks to do nothing more than rehash old arguments, the motion must be denied.

III. PLAINTIFF’S ARGUMENT REGARDING *JIMENEZ V. ALLSTATE INS. CO.* IS WRONG

Plaintiff claims “clear error” warranting reconsideration because the Court did not agree with his view of *Jimenez v. Allstate Insurance Co.*, 765 F.3d 1161, 1166 (9th Cir. 2014), cert. denied 135 S.Ct. 1834 (2015). According to Plaintiff,

1 *Jimenez* says that a plaintiff need not prove any common policy to obtain certification
 2 of an off-the-clock claim if the defendant has time records and some other type of
 3 records showing time stamps. In that situation, Plaintiff asserts that a class should be
 4 certified and the parties should proceed to a merits determination whereby a
 5 comparison of the records will demonstrate whether off-the-clock work did in fact
 6 occur.

7 Plaintiff's motion fails not only for the procedural reasons set forth
 8 above, but it also fails because Plaintiff is simply wrong given a plain reading of the
 9 district court's order and the Ninth Circuit opinion in that case. The district court in
 10 *Jimenez* found that there was sufficient evidence to certify a class with respect to the
 11 overtime claim because the plaintiff claims adjusters had presented sufficient evidence
 12 of a policy to not pay overtime. They presented evidence that the employer had
 13 reclassified the claims adjusters from salaried non-exempt to exempt while keeping
 14 their workload the same, that the employer expected them to continue working more
 15 than 40 hours per week even after the reclassification, that the employer did not
 16 require them to start recording their time worked after they were reclassified, and that
 17 the employer required that the claims adjusters' managers, who had to adhere to a
 18 labor budget, approve overtime.³ *Jimenez v. Allstate Ins. Co.*, No. 10-08486 JAK,
 19 2012 WL 1366052 (C.D. Cal. Apr. 18, 2012), *aff'd* (Sept. 3, 2014).

20 On appeal, the Ninth Circuit found that the district court had not abused
 21 its discretion in certifying the overtime class because the plaintiff had presented
 22 sufficient evidence of a common policy of discouraging overtime. *Jimenez*, 765 F.3d
 23 at 1161 and 1164 n.2. Thus, Plaintiff's contention that *Jimenez* says that he does not
 24 have to present evidence of any common policy or practice is simply incorrect.

25 ///

26
 27 ³ The *Jimenez* court also denied certification of the alleged meal and rest break class
 28 because, it found, the plaintiff had not identified any common policy or practice.
Jimenez, 2012 WL 1366052, at *15.

1 **IV. *FRLEKIN V. APPLE, INC.* IS NOT AN INTERVENING CHANGE IN**
 2 **CONTROLLING LAW**

3 As Plaintiff notes in his motion, a post-judgment motion for
 4 reconsideration may be sought “if there is an intervening change in controlling law.”
 5 See Pltf.’s Motion, 1:25-28. Plaintiff points to the recently issued unpublished district
 6 court order in *Frlekin v. Apple, Inc.* as a case which “substantiates that the Court
 7 clearly erred in denying Plaintiff’s motion for class certification.” See Pltf.’s Motion,
 8 4:19-20. Setting aside the fact that the order denying class certification is not a final
 9 judgment, the *Frelkin* order does not provide a basis for reconsideration because it
 10 does not represent an intervening change in controlling law.

11 The *Frelkin* order is not “intervening” since it was published prior to the
 12 hearing on Plaintiff’s motion for certification. Plaintiff acknowledges that fact. See
 13 Pltf.’s Motion, 4:15-20.

14 Neither does the *Frlekin* order represent any change in law. In fact,
 15 Plaintiff seems to argue that *Frlekin* supports his view of *Jimenez*, although it’s not
 16 clear how the two cases are related. As Defendants understand the *Frlekin* court
 17 order, it undermines rather than supports Plaintiff’s contention that he carried no
 18 burden to affirmatively show the existence of a policy or practice of off the clock
 19 work. In fact, his own discussion of the case and the block quote he takes from the
 20 case and places in his moving papers states that “plaintiffs have submitted substantial
 21 evidence that Apple had a state-wide written policy, which will serve as a common
 22 method of proof for all California stores.” See Pltf.’s Motion, 5:9-11. Thus, the
 23 *Frlekin* case (1) does not support Plaintiff’s contention that he may prove
 24 commonality based on a comparison of individual drivers documents alone; (2)
 25 contradicts his argument that Ninth Circuit law does not require that he affirmatively
 26 show the existence of a common policy or practice; and (3) is distinguishable for the
 27 fact that the plaintiff in that case *did* satisfy his burden to the court’s satisfaction
 28 whereas Plaintiff here did not.

1 Finally, the *Frlekin* order is not controlling law. Rather, it is an
 2 unpublished district court interlocutory order from the Northern District of California.
 3 District courts are not bound by other district courts' decisions even within their own
 4 district. *See Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) (“[T]he rule
 5 could just as easily operate so that the first district judge to decide an issue within a
 6 district, or even within a circuit, would bind all similarly situated district judges, but it
 7 does not”). The unpublished opinion of the district court in the *Frlekin* case is not
 8 controlling and cannot be the basis for reconsideration under Rule 59(e).

9 **V. CONCLUSION**

10 For the reasons set forth above, Defendants request that the Court order
 11 that Plaintiff's motion for reconsideration is denied.

12 Dated: August 24, 2015

13
14
15 (s) Lena K. Sims

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 22 COCA-COLA REFRESHMENTS
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24 Firmwide:135224963.1 074184.1073

KILBOURNE V. BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, ET AL.
USDC-CASE No.: 3:14-cv-00984-MMA-(BGS)

DECLARATION OF SERVICE

I, ROSA DYER, declare:

I am, and was at the time of service of the papers herein referred to, over the age of 18 years, and not a party to this action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is 501 West Broadway, Suite 900, San Diego, California 92101.

On **August 24, 2015**, I served the following document(s):

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF COURT ORDER DENYING CLASS CERTIFICATION

on the parties in this action addressed as follows:

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VIA CM/ECF ELECTRONIC FILING SYSTEM: I transmitted via the Internet a true copy(s) of the above-entitled document(s) to the CM/ECF system of the United States District Court for the Southern District of California and concurrently caused the above-entitled documents(s) to be sent to the recipients listed above pursuant to the Service List maintained by and as it exists on that database. This will constitute service of the above-listed document(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **August 24, 2015**, at San Diego, California.


 Rosa Dyer

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